

Baby Doe, et al. v. Mast, et al., 3:22-cv-49, 1/15/2025

1 UNITED STATES DISTRICT COURT
2 FOR THE WESTERN DISTRICT OF VIRGINIA
3 CHARLOTTESVILLE DIVISION

4 BABY DOE, ET AL., CIVIL CASE NO.: 3:22CV49
5 JANUARY 15, 2025, 1:02 P.M.
6 CHARLOTTESVILLE, VIRGINIA
7 MOTIONS HEARING

8 Plaintiffs,
9 vs.

10 JOSHUA MAST, ET AL., Before:
11 Defendants. HONORABLE ROBERT S. BALLOU
12 UNITED STATES DISTRICT JUDGE
13 WESTERN DISTRICT OF VIRGINIA

14 APPEARANCES:

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1 (Proceedings commenced, 1:02 p.m.)

2 THE COURT: Good afternoon, everybody.

3 Let's call our case if we can, please.

4 THE CLERK: Doe and others versus Mast and others,
5 Civil Action Number 3:22-cv-49.

6 THE COURT: All right. Let the record reflect that
7 the parties are present by their counsel.

8 I don't think I've had the pleasure of meeting
9 anyone. So I'm going to start, Ms. Eckstein, by process of
10 elimination, being the only woman on the pleadings, I know who
11 you are. If you could go ahead and introduce your team, then
12 we'll go over to the defendants' side.

13 MS. ECKSTEIN: That would be great. Sitting with me
14 at counsel table is Kevin Elliker, who will be arguing today
15 the pending motions, and also Lewis Powell.

16 THE COURT: Mr. Powell, I think we've met before --

17 MR. POWELL: We have, sir, yes.

18 THE COURT: -- a long, long time ago. I think it was
19 a mediation we had involving a swim team, if I remember
20 correctly.

21 MR. POWELL: You're exactly correct. Good to see you
22 again.

23 THE COURT: Good to see you again.

24 Mr. Moran, I think you have the Masts, if I remember
25 correctly.

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1 MR. MORAN: Yes, sir. John Moran of McGuireWoods for
2 the Masts.

3 MR. HOERNLEIN: Good afternoon, Your Honor. Mike
4 Hoernlein on behalf of Kim Motley.

5 THE COURT: Nice to meet you. I know we don't have
6 anyone for Mr. Osmani.

7 MR. MORAN: Mr. Osmani has been dismissed from the
8 case. Mr. Richard Mast is not my client, but he is not a party
9 to this motion, and so he's not here.

10 THE COURT: Right. Okay. And he's pro se; is that
11 right?

12 MR. MORAN: He is represented by Mr. Yerushalmi.

13 THE COURT: All right. Very well. So there are a
14 couple of things I'd like to do. We can follow these up
15 afterwards since we don't have anyone here. I am going to kind
16 of take a pulse at the end as to kind of exactly -- we'll
17 figure some of it during the course of the argument -- where
18 things are. I'd like to get this case set for trial so that we
19 can move forward. I see you looking for your calendar. We're
20 not going to do it today since we don't have all the counsel
21 here, but we'll get some dates set out. If we have to schedule
22 a conference call next week to get it on the calendar, we can.

23 It strikes me that especially since the Court of
24 Appeals has ruled regarding the original custody and adoption
25 orders, and I think, if memory serves me correctly, the Supreme

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1 Court has denied a writ --

2 MR. MORAN: No, Your Honor. The Supreme Court has
3 granted review.

4 THE COURT: I looked at it last night and I thought I
5 saw it was refused on October 2nd.

6 MS. ECKSTEIN: It granted review and it's scheduled
7 for a hearing in the February sitting, which is February 24th
8 through 28th.

9 MR. MORAN: So we don't know, but I think we expect a
10 ruling around July.

11 MS. ECKSTEIN: Hopefully earlier.

12 MR. MORAN: By around July.

13 THE COURT: I'll age myself. When Chief Justice
14 Carrico came in, he set the schedule. A case is not going to
15 sit in the Virginia Supreme Court for more than a year. So you
16 all got up there in July, August. So you know you'll have
17 something by then.

18 All right. So we're primarily here today then -- one
19 other thing. It fell off my radar screen. I know there is a
20 motion to reconsider the sanctions order. I realized that as I
21 was going back through all this today, that I had not ruled on
22 that. I'll get that ruled on quickly.

23 Is there any reason for argument on that or just
24 submit it on the papers?

25 MR. MORAN: Your Honor, we would be pleased to

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1 address any questions the Court may have, but we'd otherwise
2 submit it on the papers.

3 THE COURT: I would love to tell you that I've read
4 it, but just in getting ready for this, I realized I hadn't
5 touched it. So I haven't looked back at it. I need to look
6 not only at your motion and the response, but also go back and
7 reread Judge Moon's sanctions order and also the earlier order
8 that I know part of that deals with what the Fourth Circuit has
9 in front of it now, as well as which order is it really dealing
10 with.

11 Okay. So let's address the motions to dismiss.

12 Mr. Elliker?

13 MR. ELLIKER: Elliker, Your Honor.

14 THE COURT: Mr. Elliker, go right ahead.

15 MR. ELLIKER: Thank you very much, Your Honor. And
16 Your Honor, I have -- because I think it might be helpful given
17 the articles -- I have a demonstrative, if I could pass that
18 up.

19 THE COURT: That would be fine. I've printed out all
20 the articles as well.

21 And Mr. Moran, do you have a copy of this?

22 MR. MORAN: Yes, Your Honor.

23 THE COURT: Okay. Very good.

24 MR. ELLIKER: Good afternoon, Your Honor. Kevin
25 Elliker from Hunton on behalf of John and Jane Doe.

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1 As you noted, we're here on the plaintiffs' motions
2 to dismiss the counterclaims filed by Joshua and Stephanie Mast
3 and also by Kimberley Motley. Even though there is two sets of
4 claims, they are effectively identical. Where there is any
5 kind of distinction, I will try to parse that out. But both
6 sets of defendants have alleged defamation, IIED and
7 conspiracy. As we laid out in our papers, we think that the
8 motion really boils down to the viability of the defamation
9 claims. I think that Joshua and Stephanie Mast have agreed
10 with that. Ms. Motley has a contention that I can talk about,
11 about why she thinks that her conspiracy claim could survive
12 the dismissal of defamation. At the tail end of our reply
13 brief we explain why that's pretty clearly not the case under
14 Virginia law. But on the assumption that what we're really
15 just talking about here is the viability of the defamation
16 claims, that's what I'm going to address today.

17 There's three categories or three parts to the
18 argument that I'd like to address. First is the question of
19 the domestic relations exception. The second is the statute of
20 limitations, and then the third is the sufficiency of those
21 defamation allegations.

22 THE COURT: It struck me that as it relates to the
23 defamation -- the domestic relations exception -- and this is
24 the reason -- I don't know how I missed they granted review in
25 the Supreme Court because I completely misread it. So don't

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1 trust anything I say from here on out. But at least at this
2 point in time, the custody order and both adoption orders are
3 void *ab initio*. The court didn't have subject matter
4 jurisdiction, right? And so it makes what Judge Moon did
5 imminently reasonable; and that is that the facts and
6 circumstances that relate to your underlying claim all are what
7 happened in Afghanistan coming over to the United States, and
8 the Masts gaining -- I'll use custody in the terms of
9 physically getting Baby Doe. And then it kind of stops there
10 in some respects. To the extent that there's going to be
11 further proceedings with respect to the custody and adoption of
12 Baby Doe, that's going to go forward really on the strength or
13 not of each party's position as to where they are today.

14 Why would the domestic relations exception not be
15 dealt with the same way as it relates to defamation, which all
16 talks about the actions of the Masts to get the Does over here
17 essentially was kidnapping. That's what they claim is
18 defamation. That all occurred based upon what they're going to
19 argue is their belief that they had a valid and existing legal
20 order. And it doesn't matter what happens after that's no
21 longer valid and existing, right?

22 MR. ELLIKER: Well, Judge, I think I agree with you
23 that Judge Moon's analysis guides what happens here, but I
24 think it actually -- it tilts the other direction in favor of
25 dismissing these claims. And the reason is that the

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1 plaintiffs' claims that survive the motion to dismiss accrued
2 and arose out of events that all took place before this lawsuit
3 was filed, before any of the custody disputes started to be
4 litigated in Virginia state court. The defamation claims, by
5 definition, don't arise until after this lawsuit has been
6 filed. And the basis of the defamation claims with respect to
7 the Masts is --

8 THE COURT: But if the -- but if the custody battle
9 that existed then is over -- I know it's not over because
10 you're in the Supreme Court, but if it's determined that there
11 is -- that those are void orders, what does it matter? It's
12 not what does it matter, but how does the domestic relations
13 exception, which is really -- and Judge Moon was very clear.
14 It's very narrow where the point of the lawsuit is to seek an
15 order that will provide for custody, adoption or a divorce
16 decree. And he allowed your claims to go forward -- or the
17 three that go forward -- because they only sought money damages
18 in traditional tort fashion.

19 How is it any different?

20 MR. ELLIKER: Well, Judge, I would say that to the
21 extent you're looking at what the Court of Appeals did as
22 somehow making a decision that removes the issue of the
23 domestic relations exception, I would just point out that Judge
24 Moon's decision dismissing our claims was entered after that
25 Court of Appeals decision was entered. And on page 23 of ECF

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1 455, Judge Moon talks about the fact that the Court of Appeals
2 has voided those orders *ab initio*. And so I just don't think
3 that under Judge Moon's -- the way that he applied the
4 exception to the plaintiff's claims, that that decision coming
5 down somehow takes care of that issue, because again, the
6 Masts' claim is that they could not have kidnapped their own
7 daughter, is essentially what they're saying. They were
8 defamed, and they say in their allegations that they were not
9 nefarious wrongdoers. They're loving and caring adoptive
10 parents.

11 And so the language Judge Moon used in his opinion
12 where he said that the tortious interference with parental
13 rights and the false imprisonment claims could not move forward
14 at this time with respect to the plaintiffs, he said it's hard
15 to see how those claims could go forward without having to
16 explore the scope and extent of the claims to parental rights.
17 And again, the whole notion here of kidnapping is that -- you
18 know, we talk about it in the briefing that the allegations of
19 abduction without legal cause, right -- I mean, however you
20 want to call it, if you want to parse words about it, whether
21 it should be called kidnapping or not, the assertion is that
22 they have been defamed because they did not kidnap the child.
23 And the truth is that the legality of what they did is at issue
24 in the court proceedings. And I think that -- I recognize,
25 Your Honor, it's a concededly bizarre circumstance for the

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1 domestic relations exception to arise, but I also think this is
2 a very bizarre and surreal set of facts through which this
3 litigation could come up. So we would submit --

4 THE COURT: But in the same vein -- and I'm not going
5 to relitigate what Judge Moon has already decided. I made a
6 decision when I first started this job that if I ever
7 inherit -- that whenever I inherit a case from another judge,
8 unless the judge made an error of law, it's the law of the
9 case, because otherwise I'm relitigating everything that that
10 judge has done.

11 But the underlying claims that you have as well,
12 whether they be fraud or the conspiracy or the intentional
13 infliction, also are dependent upon whether there is a valid
14 custody or adoption order, because if the adoption order that
15 was entered in 2020 -- I think it was 2020 -- 2019 to 2020 is
16 valid, then there's no fraud, arguably.

17 MR. ELLIKER: Well, I'd respectfully push back on
18 that, Judge. I think that the fraud allegation is that the
19 Masts misled the Does into the material facts that led them to
20 decide to come to the United States. And that does not --
21 whether or not they misled the Does in that respect has nothing
22 to do with the validity of the order that they held in their
23 hands. Imagine a circumstance in which there is a way for an
24 American family to get an adoption decree for a child who has
25 never set foot in America. There's not, but imagine there's a

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1 way that there could be that circumstance. Even in that
2 circumstance, if the American family then contacted the foreign
3 family and lied to them and said, We want to bring your child
4 here just to give them medical care, we'll take care of it,
5 that would still be the basis for a fraud claim.

6 THE COURT: Maybe. Maybe not. It becomes more --
7 much more challenging if they have a valid and enforceable
8 legal order.

9 MR. ELLIKER: I don't disagree with you on that,
10 Judge. And thankfully recognizing the challenge of applying
11 the domestic relations exception, I'd just point out that even
12 if the Court is inclined to think that perhaps there is
13 jurisdiction or could rule in the alternative, we think that
14 even if there is subject matter jurisdiction, these claims
15 should not move forward for the other two reasons, if I could
16 move to those.

17 THE COURT: And you may have more solid ground here.

18 MR. ELLIKER: Well, I would say we're treading on
19 ground where there's more case law.

20 THE COURT: Right. I guess that's a better way to
21 put it.

22 MR. ELLIKER: In that respect, Judge, I think it's
23 helpful to start on the statute of limitations issue where the
24 parties agree. I think all the parties agree that --

25 THE COURT: Before you go there, one other thing that

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1 jumped out at me is that -- and I have to go back and look at
2 the complaint, but it struck me that John and Jane Doe are
3 being dealt with as one, that it's the statements of the Does,
4 but aren't they separate defendants? Don't they have to
5 identify the separate statements made by each defendant as to
6 what -- who defamed who?

7 MR. ELLIKER: I think that that's -- candidly, Judge,
8 I haven't researched what kind of, you know, joint and
9 severable liability there is among married couples. Frankly,
10 the Masts -- Joshua and Stephanie Mast -- have filed these
11 claims jointly as having been jointly defamed. So we could
12 certainly look into that and submit supplemental briefing on
13 that issue.

14 THE COURT: I mean, I think you can certainly -- a
15 spouse can certainly ratify what their spouse does. I mean, if
16 my wife and I are sued for defamation based upon statements
17 that I made only, and she hasn't said or done anything, she's
18 not responsible for those statements, unless necessarily she
19 ratifies them, right? I think that's the state of Virginia
20 law.

21 MR. ELLIKER: That sounds right to me, Judge. I
22 would say that that also gets towards the insufficiency of the
23 allegations themselves, which I'll get to -- turn to in a
24 moment, if that's okay.

25 On the statute of limitations issue, the parties

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1 agree we're talking about the application of Virginia law for
2 the limitations period, and that that limitations period is one
3 year from when the counterclaims are filed. There is no
4 argument that the original filing of the lawsuit by the
5 plaintiffs tolled that time period. And so we're really
6 talking about under Virginia law, the allegedly defamatory
7 statements have to have been made within the year preceding the
8 filing of their counterclaims. So we're talking about a period
9 between September and August of 2023 to September/August of
10 this past year, because there's a few weeks' difference between
11 when they filed their counterclaims.

12 THE COURT: And I think your argument is really easy.
13 You've got two articles at that point. It's the republication
14 piece that's the more difficult piece.

15 MR. ELLIKER: And I'll jump right to that, Judge. We
16 think that the issue of republication, as you point out, the --
17 well, I should say this: I think that the implication of the
18 republication argument that's been made by the defendants here
19 in support of their counterclaims is the tacit acknowledgment
20 that that's the only way that they can get in the claims that
21 predate that year.

22 THE COURT: It's from that October 2022 article, I
23 believe.

24 MR. ELLIKER: Right. And Your Honor, I can explain
25 what this chart shows now. The chart here has listed the seven

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1 articles that have been discussed in the pleadings and the date
2 that they were published. And then you can see there are six
3 different categories that we've put across the top to identify
4 a reason why that article would not provide a sufficient basis
5 for a defamation claim.

6 I would just point out, before I forget, article
7 number 2 on this list is from the *New York Times* magazine.
8 It's one of the longer articles. Your Honor said you printed
9 them out. That *New York Times* magazine article was cited by
10 Richard Mast. And so it was discussed in the original motion
11 to dismiss because it was relevant to him. That article has
12 not been cited by either of the counterclaims that remain in
13 front of you. Ms. Motley generically mentions the *New York*
14 *Times*, but doesn't cite this article. So I'd just point out
15 that that's why that very first column says, Article not
16 alleged. It's not even included there.

17 But with respect to republication, Your Honor, we're
18 only talking about articles 6 and 7 at that point as being a
19 basis to try to draw back in any of the preceding five
20 articles. As we point out in our papers, I think that the
21 argument is pretty clearly foreclosed by the Fourth Circuit's
22 decision in *Lokhova* from 2021. That was a published decision
23 written by Judge Thacker and it talks about this argument that
24 republishing -- it talks about the application of the
25 republication doctrine in the context of the Internet. It says

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1 when there is a hyperlink included in an online publication,
2 that hyperlink in and of itself does not constitute a
3 republication. And I would just point out to you that on page
4 143 of the opinion, after discussing case law from the Third
5 Circuit about this issue, the court wrote, We see no principled
6 reason for holding a hyperlink distinct from a traditional
7 reference, such as a footnote, for purposes of republication.

8 So imagine, if you will, Judge, looking at any of
9 those articles where there is a hyperlink, instead of it being
10 a link that you could click on, a footnote, and the footnote
11 drops, and at the bottom there's a Bluebook citation to the
12 article that would have been hyperlinked. That is exactly the
13 circumstance here. Now --

14 THE COURT: As opposed to pulling a quote out of the
15 article and then putting it into the new article that Joe Smith
16 said such and such.

17 MR. ELLIKER: Absolutely. And Judge, I think, you
18 know, all of us are I think fairly tech savvy these days.
19 There are frequently websites that we might go to where they
20 would say, Did you see this article that was written in the *New*
21 *York Times*? And then there's a block quote and you can read
22 that. And there may be a hyperlink within it, but it actually
23 republishes it. And I think that is the circumstance where the
24 *Nunes versus Lizza* case is addressing, the Eighth Circuit
25 decision the Masts discuss. In that case, Ryan Lizza, who is a

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1 journalist, had written an article that Congressman Devin Nunes
2 said was defamatory. And then he retweeted a link to it. And
3 I do want to -- I do feel compelled to correct something in our
4 briefing, Judge. The *Lizza* case is not a case about statute of
5 limitations. It's actually about sufficiency of alleging
6 actual malice. What Congressman Nunes argued was that the
7 context of the retweet itself was another defamatory
8 republication because the retweet came after Nunes had filed
9 his lawsuit. The idea was: Here's this defamatory article.
10 Journalist gets sued. After he gets sued, knowing it's
11 disputed, he goes, hey, I've got a great story for my readers
12 to read. And then retweets it.

13 THE COURT: Publishes it again.

14 MR. ELLIKER: Exactly.

15 And so the Eighth Circuit says that's sufficient to
16 show actual malice, and they did that by talking about why that
17 is a valid republication.

18 There is a citation in the Eighth circuit to the
19 Fourth Circuit *Lokhova* decision and it says, We're not
20 addressing the circumstance that happened in *Lokhova* where
21 there is this argument that -- or I should say, even the Eighth
22 Circuit decision acknowledges that *Lokhova* is not this broad
23 proposition that you can never hyperlink. It's the context.

24 And we put in the reply, Judge, the two examples that
25 the Masts had for the, you know, alleged context around these

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1 hyperlinks in the articles. One of those hyperlinks, back to
2 the October '22 article, is in the middle of a paragraph where
3 the *Associated Press* is describing statements that the U.S.
4 government has made in the state court proceeding. And then it
5 ends with -- you know, it has a quote. The *Associated Press*
6 says, According to secret records reviewed by the *Associated*
7 *Press*. It's in the middle of that sentence that there is a
8 hyperlink back to the October article.

9 So we think that even if you were to try to look at
10 the context around the hyperlink to find something that makes
11 this a republication, it's not as though they were saying, look
12 what the -- look what the plaintiffs in this case had said
13 previously. It's just contextually, not only is it about what
14 the government has said, it's quoting them from something they
15 filed in court. So even if that were -- even if what the
16 government said were true --

17 THE COURT: There's no immunity there.

18 MR. ELLIKER: Right. Exactly.

19 THE COURT: From you all's perspective, is -- are
20 there statements that are made -- because there's a
21 discussion -- and I'll talk to Mr. Moran about this -- this
22 kidnapping narrative and what that means, whether that's
23 sufficient. But are there actual statements made in any other
24 article, other than the October 20, 2022 article, that are
25 attributed to either John or Jane Doe?

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1 MR. ELLIKER: Your Honor, I note here in the chart
2 there is the second-to-last column. It says, plaintiffs not
3 quoted. Those first three articles do have quotes from the
4 plaintiffs. I know the statement you're thinking of with
5 respect to a quote of Jane Doe saying something about -- using
6 the word kidnap in the first article. I can't recall off the
7 top of my head, Your Honor, what the statement is in the second
8 one, but I know they are quoted in those articles.

9 THE COURT: I think in some of those articles -- and
10 Mr. Moran will have a better sense than I -- some of it is
11 talking about their feelings of losing Baby Doe, and whether
12 that's actionable or not is I guess maybe a separate question.

13 MR. ELLIKER: Well, and Judge, I think that assuming
14 that we're comfortable with -- well, I should say that I think
15 republication --

16 THE COURT: I know you're comfortable with it.

17 MR. ELLIKER: I should say I'm very comfortable with
18 it, Judge. But I would just point out: Republication ends it,
19 right? If there is no republication here, then as we were just
20 talking about, the only articles that even purport to quote the
21 plaintiffs -- set aside whether what they actually said was
22 defamatory, but even the ones that actually purport to quote
23 them -- all are time barred. And so really then you're only
24 looking at those in-period articles which do not quote the
25 plaintiffs.

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1 THE COURT: And the rest of them are hyperlinked?

2 MR. ELLIKER: Yes. And I would say, the third column
3 here says, no later hyperlink. That is an indication that
4 articles 2 and 3 are not hyperlinked in the in-period articles.
5 So if you're relying on a hyperlink to pull back an article to
6 be timely asserted, articles 2 and 3 don't get -- you don't get
7 those, because there's no hyperlinks to those in the other
8 articles.

9 THE COURT: In other words, no publication within the
10 one year?

11 MR. ELLIKER: Right. Exactly.

12 And I should also say that the particulars of this
13 republication argument are all based on the responses from
14 Joshua and Stephanie Mast in their opposition. Ms. Motley
15 doesn't identify where and how there has been any
16 republication, other than just generically saying in the
17 complaint that this has been republished, but there is no
18 assertion of when. And I submit, Judge, that that's likely
19 because Ms. Motley is not mentioned in any articles after
20 November of 2022.

21 THE COURT: Do I -- if I agree with you with respect
22 to defamation, it does have a waterfall effect with respect to
23 the other claims. I get that. But do I have to give, from at
24 least the plaintiff's perspective, the defendants an
25 opportunity to amend, understanding the way the Fourth Circuit

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1 tells us how to deal with 12(b)(6)s and so forth? Factually
2 they may not be able to get there, but don't I have to give
3 them a chance if possibly there is sufficient evidence out
4 there?

5 MR. ELLIKER: Well, Judge, I would just say that each
6 defamation claim is premised on -- in general in Virginia, if
7 you're making a defamation claim, it's premised on a statement.

8 THE COURT: Right.

9 MR. ELLIKER: Now, they have not identified a
10 statement anywhere in their complaint for any of these
11 articles, and so it's hard to see what they would do. But I do
12 think that as to these seven articles, there is no need to give
13 leave to amend because it would be futile.

14 THE COURT: They rise and fall. Right.

15 MR. ELLIKER: It would be futile. I mean certainly
16 the first five, those are time barred. But even number 6 and
17 number 7, we know that there's no statements alleged in the
18 complaints. And that's probably because, if you go to the next
19 column, the plaintiffs aren't quoted in the articles. So they
20 don't need leave -- so, I mean, I don't think -- I think we can
21 just look at the practical reality, Judge. They don't need
22 leave to amend to assert claims of defamation on two articles
23 that don't quote the plaintiffs.

24 THE COURT: Are you satisfied -- and this is outside
25 the pleadings, but it helps me kind of understand where we

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1 are -- is this the universe of articles that deals with this
2 particular issue? I'm sure the case has been reported on in
3 many different places, but if all they're doing is reporting on
4 pleadings and allegations made in pleadings, that's something
5 different. Is this the universe we're dealing with? I'm sure
6 you all know all the publications that have been out there more
7 likely than not.

8 MR. ELLIKER: I would say it's not, Judge, because
9 the case continues to get media attention. In fact, in the
10 Masts opposition to our motion to dismiss they identified
11 another article that had been published in the intervening
12 time. We say, just for the sake of the record, that that's not
13 the basis for a claim because it's not included in their
14 complaint.

15 THE COURT: But wouldn't you want me, then --
16 especially if I agree with you -- that the statements that are
17 made more than a year before, especially if I agree with you
18 that they're not actionable, wouldn't you want me to deal with
19 that, because I presume that what's being picked up now would
20 all be republication things?

21 MR. ELLIKER: Absolutely, Judge. That's why I think
22 in terms of -- if I may be so bold as to think how a decision
23 might come out on this, setting aside the jurisdictional
24 domestic relations issue, we're talking about the articles --
25 all these articles published are all time barred. To the

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1 extent all that we're seeing in articles 6 and 7 are those
2 hyperlinks, that's not sufficient for republication. And then
3 with respect to any -- and then with respect to articles 6 and
4 7 themselves, that's where we have the other issues, which I
5 believe are not as -- is my third point, so hopefully -- I
6 appreciate your indulgence in talking through these issues --
7 having to do with the insufficiency of actually alleging
8 defamation. There is a back and forth in the briefing about
9 Virginia pleading standard of *in haec verba* versus what the
10 federal pleading standard is. I don't think that we need to
11 get too caught up on that because we can just look at what
12 *Twombly* and *Iqbal* say with respect to sufficient allegations,
13 plausibly supporting the claim, and then ask, well, in
14 defamation we're talking about the words, right, the defamatory
15 words. And they don't allege what the words that our clients
16 said were. All they talk about is this freeform narrative.
17 And the reason that we find that so problematic, Judge, is
18 because the articles are written about the litigation. The
19 narrative that they say is defamatory is the narrative of what
20 the litigation --

21 THE COURT: It's in the pleadings, right?

22 MR. ELLIKER: And in fact, Judge, yesterday when I
23 was looking at -- looking back through to prepare for today's
24 hearing, I noticed -- trying to figure out again: What exactly
25 are the defendants saying are the words, if they said any words

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1 at all? And Ms. Motley's claim at paragraph 103 uses the
2 words, in quotes, lied and lured, that she's defamed because
3 the plaintiff said that she, quote, lied to them, and that she,
4 quote, lured them to the United States. Those two words don't
5 appear in any of the articles. Lied and lured are not in the
6 articles. The word lure appears three times in our amended
7 complaint where we assert our claims against Ms. Motley. And I
8 think that gives the game away, Judge. What we're really
9 talking about here is using these defamation claims as a way to
10 fight back against the veracity of the claims that have been
11 brought to them in this court. Of course, we all know the way
12 to do that is through this litigation system, and not through
13 using a defamation counterclaim.

14 Judge, I'm happy to address any other particular
15 questions you might have, but you already mentioned amendment.
16 I think it would be futile, but I do appreciate your indulgence
17 on this.

18 THE COURT: One other question just to make sure that
19 I'm clear and that it's on the record. What, in your view, are
20 the counterclaim plaintiffs' -- or the defendants' --
21 allegations as to what the conduct was to constitute
22 intentional infliction?

23 Is it -- does this all spring out of the defamation
24 or is there -- are there separate acts that are alleged? I
25 wasn't aware of any separate acts alleged.

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1 MR. ELLIKER: I'm not aware either. I do believe,
2 Judge, that the claim is that the intentional infliction of
3 emotional distress was accomplished by way of defamation. And
4 I'm fairly certain that Mr. Moran in his response agrees with
5 that. I think even Mr. Hoernlein in his response also agrees
6 that the IIED claim, the substance of that, what is the basis
7 of it, is the defamation.

8 Now, very briefly, the nuanced sort of conspiracy
9 question, Mr. Moran concedes for his clients that everything
10 rises and falls with defamation. For Ms. Motley there is a
11 contention that the civil conspiracy claim could survive if
12 defamation is dismissed because there was also a conspiracy to
13 commit IIED. But I think they're all daisy chained together.
14 If IIED is with defamation and defamation goes away, then it's
15 gone.

16 THE COURT: But likewise, if defamation survives,
17 they're all going to survive more -- well, maybe intentional
18 infliction has a few different elements to it.

19 MR. ELLIKER: Right, Judge. And candidly, we did not
20 seek to dismiss the IIED and conspiracy claims on their own --
21 on their own. We did it by virtue of how they're tied up with
22 defamation.

23 I would also just add that there's a Supreme Court of
24 Virginia case that says Virginia doesn't recognize a conspiracy
25 to commit IIED. So even if somehow it were on its own, that's

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1 not -- you know, there's a theoretical world in which I guess
2 the only claim left is IIED if that didn't depend on
3 defamation.

4 THE COURT: Okay.

5 MR. ELLIKER: Thank you very much.

6 THE COURT: Mr. Moran, how are you today?

7 MR. MORAN: Doing well. How are you?

8 THE COURT: Doing well, thank you.

9 MR. MORAN: Your Honor, the Masts' defamation claim
10 rests on the straightforward principle that if you knowingly
11 lie about someone and damage their reputation, you are liable
12 in tort, even if you happen to also be litigating against them.
13 Judge Nichols in the DDC case of *U.S. Dominion, Incorporated*
14 *versus Powell*, which we cited in our opposition described, this
15 straightforward principle. And we think it's telling that the
16 Does didn't address it in their reply brief.

17 THE COURT: But don't you -- and we can circle back
18 to the domestic relations exception if you want or not -- and I
19 recognize that you all filed this counterclaim notwithstanding
20 the very strenuous objection to Judge Moon's ruling on the
21 domestic relations. So I know you're not conceding anything in
22 that regard. Don't you have to identify what the statements
23 are of each of the John and Jane Does? I mean, they're not
24 responsible for each other's statements, right?

25 MR. MORAN: So Your Honor, our understanding and as

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1 we've alleged it -- and if the Court -- we can get to this
2 later -- if the Court decides that there is more particularity
3 required, we've asked for the opportunity to re-plead to meet
4 it. But our understanding is that -- and I'll refrain the urge
5 to call some potential media witnesses out of the crowd -- but
6 our understanding is that John and Jane Doe gave a joint
7 interview to the news media in which these statements were made
8 and presumably ratified as to one another. I mean, you know,
9 again, if the Court felt like we had to get into the
10 granularity of that, then we would do what we felt like we
11 needed to do to do that, as well as statements that were made
12 on their behalf by agents, namely attorneys who represented
13 both of them jointly. And so just as a matter of the facts as
14 we understand them and have alleged them, we don't believe this
15 is a case where, you know, a husband or wife made a defamatory
16 statement and we're trying to lump them together just because
17 they happen to be married. We just think the context in which
18 we understand these statements to have been made, and then in
19 fact republished -- I mean, I think in a certain sense even the
20 original articles that quote the Does are actually
21 republications of the statements that were made by the Does or
22 their agents directly to the reporters in the first instance.
23 There was a completed and actionable defamation at that
24 point --

25 THE COURT: That has to occur, right?

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1 MR. MORAN: Right. And I think that's part of
2 what -- but I think that actually matters for the rest of what
3 happens after the one-year limitations cutoff, because what
4 they want to say is, unless we can point to an instance in
5 which the original republication in one of the 2022 articles
6 was repeated verbatim in a subsequent article, we can't show
7 republication. But to the extent that the subsequent articles
8 are based on the privately published defamation to the
9 reporters that predated the limitations period but then result
10 in the post limitation period reporting, that is also
11 actionable.

12 THE COURT: What they're really saying -- I think
13 this is Mr. Elliker's argument, and he'll correct me if I'm
14 wrong -- is that in the two articles that are within the one
15 year, is that really all you have are hyperlinks, and that the
16 Fourth Circuit has dealt with this republication issue
17 regarding hyperlinks and said that's not a republication if you
18 simply provide a hyperlink. And so you may be exactly right
19 that the prior articles contain actionable items, but because
20 they're not quoted, or that statement isn't brought forward
21 into the last two articles but only hyperlinked, you're barred
22 by the statute of limitations.

23 MR. MORAN: So Your Honor, we don't think it's
24 accurate to say that they're only hyperlinks. I can explain
25 why we think the hyperlink cases, which we view as a narrow

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1 exception to the otherwise widely well-established
2 republication rule, is basically to say: Let sleeping dogs
3 lie. If there was an old defamation outside the limitations
4 period and it was published on the Internet, and someone else
5 happens to repost a link or it gets referred to again, we're
6 not going to drudge all this back up and say, hey, this was
7 time barred but now it's been republished. Let's go back; we
8 can litigate over it. That's not at all what we have here.
9 This is an ongoing media campaign that is consciously waged in
10 parallel with litigation from both before the limitations
11 period and to this day.

12 But I do want to make sure I go back to this point --
13 Mr. Elliker's point about the indisputably timely articles.
14 And for example, what he labels as -- I left the demonstrative
15 there -- I think article 6. Yes, what he has labeled as
16 article 6 is a story by the Associated Press titled, Secret
17 Records: Government says Marine's adoption of Afghan orphan
18 seen as abduction must be undone. And I'll just read one
19 paragraph. As the family grew and bonded, Mast tracked them
20 down and tried to convince them to send the child to the United
21 States by promising medical care, the Afghan family told AP
22 last year. They said they refused to go along with the plan.
23 They didn't want to be separated from the girl, who appeared to
24 have fully recovered from a fractured skull, broken leg, and
25 serious burns.

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1 That's far more than a mere hyperlink back to the
2 story. They're referring back to the fact that they gave
3 them -- that they were interviewed by the AP the year before.
4 They repeat -- they don't verbatim there say they told us that
5 they were kidnappers, but they repeat key elements of their
6 version of the narrative, and certainly would then invite any
7 reader who clicked on the hyperlink to go back and read in full
8 what it was that they had said to the AP the year before. So
9 even if we are under the --

10 THE COURT: But doesn't that statement, standing
11 alone, have to be actionable?

12 MR. MORAN: So we don't think so, Your Honor.
13 Again -- and this is the other important piece I want to make
14 sure is clear -- that it's not as simple as Mr. Elliker says.
15 And this is, we think, the key holding of the Dominion case.
16 And again, I think it's very telling that they don't even
17 address it, right?

18 Unless the Court -- maybe the Court is not familiar,
19 but this is the Sydney Powell lying about the -- allegedly
20 lying about the 2020 election and basically using the same
21 argument, which is to say, I wasn't committing actionable
22 defamation against these election workers. I was just
23 litigating my case. And sure I was sending my pleadings to
24 every news outlet that would look at them, but that's -- you
25 know, that's all protected by the litigation privilege. And

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1 Judge Nichols says, No, it's not. Just because you write
2 something in a court document and you file it with the court,
3 that may be privileged. But if you're then sending those
4 things to the media, if you're then vouching for those
5 allegations and saying, hey, here's the document where we
6 explain what really happened, that can be actionable
7 defamation, even though it's contained under the heading --

8 THE COURT: I get that. But doesn't this statement,
9 which is the one in article 6, which is September 15, 2023,
10 doesn't that statement, standing alone, have to be actionable?
11 I mean, there is not any indication -- I read this article -- I
12 don't have it committed to memory the way you do, I'm sure --
13 and it was the only point in there in which there was some
14 indication that the Does had either spoken to the press or made
15 any statements. And there's not any indication that the
16 pleadings were sent out beyond the ECF documents or the court
17 filing system.

18 MR. MORAN: Your Honor, there are a few embedded
19 points I'd like to address in there.

20 THE COURT: Please.

21 MR. MORAN: So one, I do think that we are entitled
22 to bring a claim. So suppose it's true as we have alleged --
23 and as the Court would naturally on a motion to dismiss --
24 suppose it's true that what the Does told the reporters in 2022
25 when they sat down with them and when their counsel spoke with

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1 them, are all the things that they have pleaded in their
2 complaint and alleged in litigation, that they -- which is
3 presumably what you would do, right? You're bringing the
4 litigation. You're making these allegations there. You decide
5 to set up an interview with a reporter. You go and you repeat
6 all the things that were said there. If you then have an
7 article like this 2023 article that says here is the story
8 that -- you know, that they have set out, here's what they
9 allege against the Masts, and it mostly cites the litigation,
10 and then it talks about a piece of it and says, you know, as
11 they told us last year when they sat down with us, we don't
12 think -- certainly not at the pleading stage, we don't think
13 that you can say, well, if the media was careful and they just
14 cited the pleadings for all the really bad stuff about
15 kidnapping and lying and deceit, and then they just cited your
16 interview for the more heartwarming pieces of your story, that
17 that's immune from liability. Now, it may be that plaintiffs
18 and counterclaim defendants would have a defense at trial to
19 say all of our actionable defamation that was not privileged by
20 litigation occurred outside the limitations period, but since
21 then we've been very fastidious. We have not repeated any of
22 it. And lucky us, the media has been very careful never to
23 republish anything -- only to republish our litigation
24 statements, and never to republish our private defamation to
25 them.

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1 THE COURT: Maybe I agree with you, but that's not
2 the way in which you pled your counterclaim. You pled your
3 counterclaim that there is a kidnapping narrative. You haven't
4 alleged facts upon which it's plausible for me to conclude or
5 someone to conclude that the publication was made to a reporter
6 which then repeats a kidnapping narrative that may not have a
7 direct quote one way or the other. And so you may be right.
8 If the Does sat down with -- here it's Martha Mendoza. They
9 sat down with Martha Mendoza and they said, Here are our
10 pleadings, and then they repeated their story to her, and she
11 took that interview and then wrote an article, but only quoted
12 them once or twice like you say -- we were heartbroken when
13 these events occurred -- you may be right at that point in
14 time. But that's not the way in which it's alleged.

15 MR. MORAN: So Your Honor, I'm happy to be perfectly
16 candid with the Court. So again, that's not how we viewed the
17 pleading burden at this stage. If the Court were to say that
18 it is the pleading burden, we'd welcome the opportunity to meet
19 it. The somewhat limiting factor, we know the nuts and bolts
20 of this, right? We have requested in discovery the
21 communications between the Does and the media. They have --
22 they previously refused to produce that information in
23 discovery. If the Court orders us to provide clarity on
24 penalty of having the claims dismissed, you can be assured I
25 will be revisiting that with counsel as to whether or not we're

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1 entitled to those materials in discovery.

2 THE COURT: And I'm sure the reporter doesn't want to
3 talk to you.

4 MR. MORAN: And then we'd do the best we could to lay
5 that out.

6 We think under Rule 8 -- and not just Rule 8 standing
7 alone, but the context of this case, both what we've pleaded in
8 the counterclaim complaint -- we think the Court can also just
9 look at their complaint and our answer to the complaint to
10 inform the reasonableness of the allegations we're making. And
11 I think that's where I point to --

12 THE COURT: Well, since we're being candid with each
13 other here today, the challenge that I had is knowing how much
14 of the article springs from statements that are attributed to
15 the Does and how much of the article springs from statements
16 that are contained in the pleadings. And I think you would
17 agree with me that if an industrious reporter pulls down all
18 the pleadings and writes an article solely from those
19 pleadings, it's not actionable against the Does.

20 MR. MORAN: Solely being the key point there, Your
21 Honor. And I think the proposition that Judge Nichols's
22 decision in the *Dominion* case stands for is that once you cross
23 that -- once a litigating party crosses the rubicon of engaging
24 with the media and vouching for their allegations, not only
25 does that create a little island of actionable defamation, but

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1 it actually brings their pleadings into what they're presenting
2 to the reporter.

3 THE COURT: This is what I think *Iqbal* and *Twombly*
4 probably require, is it probably requires a more fulsome
5 factual allegation in that regard, rather than we think --
6 right now I think where you are is: We think that the Does
7 actually made these statements to reporters, and we want to
8 conduct discovery to confirm that.

9 MR. MORAN: Well, we know that they made at least the
10 statements that are reported in the 2022 article, and we know
11 that those statements were not just published in the 2022
12 article, but we know -- and I think we can plausibly infer as
13 well -- that they're part of -- they're part of the record, so
14 to speak, that the reporters have been using to continue to
15 write these stories about the overarching allegations.

16 I do want to make sure -- and this September article,
17 as Mr. Elliker said, it's the secret records article. And I
18 think this is really telling in this regard because to some
19 degree their argument becomes entirely circular. They say
20 that's not actionable because what that's talking about is a
21 disciplinary proceeding that was held by the Department of
22 Defense with respect to my client and Joshua Mast, and that's
23 -- anything that the government alleged there is privileged --
24 subject to the litigation privilege.

25 THE COURT: This is supposedly the records that came

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1 out of the J&D court or the Fluvanna County court?

2 MR. MORAN: No, Your Honor.

3 THE COURT: Are you talking about the United States
4 document?

5 MR. MORAN: This is a reference to -- as I understand
6 it, this is a reference to a disciplinary proceeding in which
7 the Marine Corps reviewed whether or not Joshua Mast had
8 violated certain obligations he had to the military in
9 connection with the same factual allegations. And we know that
10 counsel for the Does were there at the hearing talking to
11 the -- you know, it wasn't a criminal case. It's not
12 prosecutors, but talking to the military lawyers and feeding
13 them the same arguments that they have been using throughout
14 the litigation. And the two primary counts there were failure
15 to obey a lawful general order and a false official statement.
16 Mr. Mast was found not liable for those two -- for those two
17 allegations. There were two separate ones. There was a misuse
18 of a government computer and conduct unbecoming of an officer,
19 which was sort of a catchall for all three. And because of the
20 computer issue, the military concluded that he had -- that
21 those allegations had been proved, but they recommended that he
22 be retained in the military and that the case be closed.

23 But the key point is that among the evidence that was
24 presented by the military attorneys at the disciplinary conduct
25 hearing were the very articles that we're talking about. And

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1 so we've arrived at this -- again, this sort of circular point
2 where they're giving statements to the media, the media is then
3 publishing those statements, they're then taking the media's
4 publication of those statements, giving them to lawyers for the
5 government to use against Mr. Mast in a disciplinary hearing.
6 The government is doing that, and then they're pointing and
7 saying, oh, well, if the media is reporting on the disciplinary
8 hearing, you can't hold us responsible because this is all just
9 litigation privilege, when it's all fed back to those same
10 statements.

11 THE COURT: The problem is I can't rely upon any of
12 that at the 12(b) (6) stage, right?

13 MR. MORAN: Well, Your Honor, I think the point is
14 you can't -- to me, at least, this goes to two issues. It goes
15 to the continuing nature of the defamation and whether this is
16 a hyperlink situation where it's old statements that are just
17 now being kind of plucked back by a narrow republication, and
18 then they go to the question of the pleading standard, but I
19 think it is -- again, we could replead and allege all this, if
20 that's what the Court thought was necessary. But again, we
21 don't think it's necessary, because the question is: Is it
22 plausible based on the facts alleged that there has been an
23 actionable republication of the defamation -- of defamation
24 within the limitations period, and we think the answer is yes.

25 I mean, again, I will acknowledge readily this is a

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1 privileged litigation statement, but just two weeks ago they
2 filed their response brief in the Supreme Court of Virginia and
3 these same allegations appeared again, that Joshua and
4 Stephanie Mast deceived the Fluvanna County Circuit Court in
5 entering a final order of adoption. They hid the existence of
6 the A's -- which is in reference there. They hid their
7 adoption efforts from them. They hid their scheme from the
8 United States. They relied -- relying on the M's falsehoods,
9 the circuit court granted the order. They then spent months
10 luring their clients away to Virginia by bombarding them with
11 dire and false warnings that the child needed immediate medical
12 care. And then later they have a section of their brief on
13 page 12 that says, the Ms lured their client to Virginia and
14 kidnapped their child.

15 So there is no -- I don't think there's a real
16 question about are they really -- are there really statements
17 here that are false and defamatory? Again, as we've alleged
18 them, we recognize that at trial we'd have to prove that those
19 are false.

20 THE COURT: But like you said, that's an immune
21 publication, right?

22 MR. MORAN: So again, Your Honor, that in and of
23 itself is a privileged communication. But what -- we think the
24 principle that should govern here and the principle that Judge
25 Nichols lays out in the *Dominion* opinion -- because again,

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1 remember, this is precisely the argument that the defendants in
2 that case were making, which is, Hey, you know, they're saying
3 that we were defaming them -- these election officials say we
4 were defaming them, but we were litigating. We were filing all
5 these claims. All that this is based on is the statements that
6 were being made in documents. And what the court said is, If
7 you write it in a court document and then you turn around to a
8 reporter and you say, here's our argument --

9 THE COURT: It happens all the time. People filing
10 their pleading and then they send it as part of a press
11 release.

12 MR. MORAN: If it's actionable defamation, then
13 they're liable for it.

14 THE COURT: That's different, right. But I'm
15 constrained by the four corners of your counterclaim, right, as
16 to whether -- it's really just for me to decide and for both of
17 you all to argue as to what *Iqbal Twombly* requires.

18 MR. MORAN: Absolutely, Your Honor. And look, as
19 we've said, if the Court decides that the current pleadings
20 don't meet that, A, I would say we would ask for the
21 opportunity to replead; B, we would also, to the extent
22 possible, ask for the Court's guidance on what precisely it
23 thinks are needed, because the Does have laid out the state law
24 pleading standards that we still don't think apply, even if
25 there is some intermediate heightened standard, which I sort of

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1 take to be their argument in the reply brief, which is okay,
2 well, even if you don't have to meet the Virginia pleading
3 standard, there's still sort of a heightened particularity
4 requirement that other federal courts have applied. And so if
5 that's the route that the Court goes, we just want to -- you
6 know, for everyone's benefit -- and I think you rightly noted
7 that it's actually to their benefit to give us one chance to
8 shoot the shot, right? If the Court says you need to do it,
9 here it is, and then we fail, then that gives them greater
10 protection than it would if you just said, yeah, the ones that
11 are particularly alleged here are insufficient. As the Court
12 alluded to earlier, I do think that will become a much deeper
13 dive exercise than just recasting snippets of these seven
14 articles that are alleged in the --

15 THE COURT: I think everything in this case is a
16 deeper dive.

17 MR. MORAN: -- counter complaint. And as I alluded
18 to as well, I think there may be -- you know, hopefully if I
19 need to, and I follow up about some discovery that we think we
20 might need, we could resolve that quickly. I know those things
21 don't always shake out that way. So we would take that piece
22 by piece. And if we felt like we had to come back to the Court
23 or to Judge Hoppe, we would.

24 THE COURT: But grapple with me -- grapple with, if
25 you will, this domestic relations exception. Like I said, I

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1 recognize the continuing objection you have to --

2 MR. MORAN: Yeah.

3 THE COURT: -- the jurisdiction of the claims against
4 your clients. But if you could address Mr. Elliker's argument
5 that this is different, because to get to whether it is a false
6 statement that's then actionable -- kidnapping, luring and so
7 forth, if the order of adoption -- or if it's found in Fluvanna
8 County that your clients have no legal adoption, no legal
9 custody of Baby Doe, then that's different than if you're able
10 to prevail in the adoption matter, right? And so it
11 necessarily requires some determination by this jury as to
12 whether you had a legal right to do -- the Masts had a legal
13 right to do what they did or the Does had a legal adoption
14 order in Afghanistan. That's a poorly worded long question.

15 MR. MORAN: I absolutely understand what the Court is
16 asking us to address.

17 So I think there are a couple of different ways to
18 tackle this, but the -- I think it turns a little bit -- in
19 terms of if we're talking about presenting it to the jury, I
20 think it turns a little bit on whether that issue has been
21 decided authoritatively in the state court proceeding before or
22 after trial.

23 THE COURT: Which I'm presuming that it will not,
24 right, because if I set the case for trial either late this
25 year or early next year, you get an opinion from the Supreme

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1 Court in July/August at the latest, you're not going to get
2 back to Fluvanna County and get out of there before the trial,
3 notwithstanding appeals that would then follow, right?

4 MR. MORAN: It's very likely that -- I mean, if the
5 Supreme Court of Virginia agrees with us, then they remand with
6 instructions to dismiss the challenge and the adoption order is
7 back in place. The Does, I would imagine, would have at least
8 the opportunity to seek further review in the U.S. Supreme
9 Court if they thought it was otherwise appropriate, and they
10 may choose to do that.

11 So again, I think, you know, there are two ways to
12 think of it. One is let's assume for the sake of argument that
13 we have to go to trial without -- with the adoption orders
14 having been invalidated. And their position is basically, Oh,
15 well, in that case you're toast because you can't possibly
16 claim defamation if the underlying adoption orders have been
17 invalidated.

18 Absolutely not. It is -- the mere fact that someone
19 obtained an adoption order that turned out to be invalid for
20 one legal reason or another does not give somebody else license
21 to call them a kidnapper falsely or to accuse them of deceit
22 falsely. It is entirely possible -- just to give one of many
23 factual scenarios that a jury could find -- it is entirely
24 plausible that the Masts in good faith, but ineffectually,
25 sought and obtained --

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1 THE COURT: We had a good faith belief that what we
2 were doing was right and proper.

3 MR. MORAN: Precisely, and that they were candid
4 about their intentions with the Does, as we have alleged, and
5 that the Does' allegation that they were deceived is simply
6 false. And in that case, we believe a jury could find that the
7 Does had defamed the Masts without having -- even on the
8 assumption that the adoption order is invalid because it
9 doesn't turn on -- the defamation, the harm to their reputation
10 doesn't just turn on whether or not the adoption is valid. It
11 turns on their character and what the statements that -- the
12 false statements made reflect about their character. So that's
13 certainly doable.

14 Now, if we're at trial with that state court
15 litigation still going on, then I think the Court and the
16 parties would have to work through potentially some
17 line-drawing questions about, you know, for example -- I think
18 the Court may have alluded to this earlier -- we absolutely
19 believe that insofar as the adoption orders are valid, that
20 that gives a compelling argument that these statements were
21 false and defamatory. It's not the only element of the claim,
22 but it's an important piece of the claim.

23 THE COURT: And the Courts are given no guidance on
24 that anymore, because at least right now the Court of Appeals
25 has said any findings that Judge Worrell may have made in the

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1 order setting it aside, null and void, right, because there was
2 no subject matter jurisdiction. So there is nothing to be
3 taken away from the orders at this point in time, other than
4 the fact that they weren't valid.

5 MR. MORAN: Yes. Now, as a formal matter, our
6 position is that the legal effect of the Court of Appeals
7 ruling is stayed pending the review at the Supreme Court.

8 So --

9 THE COURT: I won't disagree with that.

10 MR. MORAN: I don't think we're literally in a
11 scenario -- but that is the import of the Court of Appeals
12 ruling, which is that the entire thing is void. And it's not
13 particularly relevant to this claim, but there are subsidiary
14 disputes among the parties in the state court litigation about
15 whether the Does can assert -- they essentially want to rely on
16 that order to assert custody and say we should be given the
17 child. And, of course, our position is, Wait a second, an
18 invalid rule just means we're in the wild west. It doesn't
19 mean that you have any established right one way or the other.
20 And so those issues are obviously continuing to play out.

21 The key point for Your Honor's question is -- and the
22 way we understand Judge Moon's prior ruling is to say if there
23 is a way for a jury to get to a judgment against the defendant
24 that doesn't require them to weigh in on whether or not the
25 adoption is valid, then the case for now goes forward. And

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1 when we get to trial, you know, summary judgment and pretrial
2 proceedings, motions in limine, we can decide: Are there any
3 lines that need to be drawn to say, hey, you're -- neither
4 party can talk about the state court proceedings, or they can
5 say this but not that, right? Those are the types of lines
6 that the Court would have to draw at that point. Now, that
7 feeds back somewhat into our argument about why we're not sure
8 the line that Judge Moon drew was the right one and why the
9 whole case should have been thrown out. But I appreciate and
10 expect that if I were in the Court's shoes, I would probably
11 have a similar principle of non-relitigation as a matter of
12 self defense on some of those things. So I fully appreciate
13 that.

14 With that, I think we have addressed the points that
15 I hoped to address, and I would turn it over to Mr. Hoernlein.

16 THE COURT: All right. Mr. Hoernlein, how are you
17 today?

18 MR. HOERNLEIN: Good, Your Honor. How are you?

19 THE COURT: I'm doing just fine, thanks.

20 MR. HOERNLEIN: So Your Honor, again, Mike Hoernlein
21 for Kim Motley. I don't want to rehash all of the very good
22 arguments that Mr. Moran just made. Many of them apply equally
23 to Ms. Motley. The parties are -- the defendants are
24 differently situated in a number of ways, and so I'll try to
25 focus my comments on those issues. And obviously, Your Honor,

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1 jump in as you like.

2 So the thrust of Ms. Motley's claim here is
3 essentially to drum up publicity for this lawsuit, the Does
4 made some outrageous claims about Motley to reporters. Now,
5 we've included in our counterclaim what we allege those
6 statements to be. And when -- which specifically are that
7 Motley spent a year and-a-half, quote unquote, befriending the
8 Does to lure them to the United States as part of a
9 well-coordinated abduction effort involving the Masts.

10 Now, putting aside the claims that the Does have
11 against the Masts, putting aside the state court proceedings
12 regarding the adoption and custody of Baby Doe, the Does knew,
13 when they made those statements about Motley, that they were
14 false. And the falsity is actually sort of on the face, we
15 think, of the complaint. Now, the irony here is that we moved
16 to dismiss the Does' claims against Motley on a number of
17 grounds. I understand Your Honor does not want to relitigate
18 Judge Moon's --

19 THE COURT: No one has asked me to do so with respect
20 to Judge Moon's domestic relations exception or his July
21 opinion.

22 MR. HOERNLEIN: And, Your Honor --

23 THE COURT: And thank you for not asking me to do so.

24 MR. HOERNLEIN: And if I get any hint that Your Honor
25 would like us to move to reconsider, that motion will be

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1 forthcoming.

2 THE COURT: I'm sure it would be.

3 MR. HOERNLEIN: But Your Honor, the fact is that
4 Judge Moon, in denying our motion, found that the Does
5 adequately pled fraud. Now, as we all know, fraud actually
6 does have a heightened pleading standard under 9(b).
7 Defamation does not. And so part of our argument was that the
8 Does alleged that -- and this is a claim they've made to the
9 press, as we allege -- that Motley made statements to them
10 that, quote unquote, lured them to the United States. She said
11 things to them that caused them to get on a plane with Baby Doe
12 and come here. Now, we said -- we've looked at the complaint
13 very carefully, and we don't see what words they allege that
14 she said. And Judge Moon said, Well, that's fine. They
15 sufficiently alleged those words.

16 THE COURT: But I think as to the defamation claim
17 with respect to Ms. Motley -- and I read the last two articles
18 specifically for this -- she is not mentioned.

19 MR. HOERNLEIN: Your Honor, she is not mentioned by
20 name; that is correct. The problem here -- and this does
21 make -- of all of the bizarre things about this case, this
22 aspect of the defamation claim is unusual as well. The point
23 is that so many articles have been written about this case, and
24 so many -- both within the limitations period and outside the
25 limitations period -- and so many statements within the

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1 litigation, within the bounds of this case and the state court
2 case -- that anyone who reads these articles knows who they're
3 talking about. And they don't have to name Motley specifically
4 if it's very clear, because they've been making these
5 allegations over and over and over that Motley facilitated an
6 abduction.

7 THE COURT: This kind of goes back to what I was
8 talking to Mr. Moran about, is that the source becomes
9 important, right? And if the source is the pleadings -- and
10 we'll set aside the pleadings that are then mailed out -- but
11 if the source is the pleadings, then the words and the concepts
12 aren't actionable, right? And so if an industrious reporter
13 gathers together the pleadings and writes an article that
14 describes all the actions that are attributed supposedly to
15 Ms. Motley, but simply says, A concerned human rights lawyer --
16 and defines her in that respect -- did A, B and C, it becomes
17 non-actionable because the lawyer spent the time gathering the
18 pleadings and writing the article. And so it becomes important
19 to know the source of the claims and how you get there and
20 knowing what the pleadings -- and knowing whether the words are
21 actionable and whether it's sufficient particularity as
22 required by *Iqbal Twombly*.

23 MR. HOERNLEIN: So Your Honor, first, the article
24 within the limitations period from September of 2023 that
25 Mr. Moran quoted, that article is not -- it's very clear from

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1 the words in the article that the statement is based on what
2 the Does told the AP last year. In fact, it says the Afghan
3 family. And so sure, we can't say whether it was Jane Doe or
4 John Doe, but it's clear in this article within the limitations
5 period -- and I think Mr. Elliker, I'm sure it was an
6 oversight -- Mr. Elliker said that there was no statements in
7 these two articles at all. And I would submit that's a
8 statement. And it doesn't use the word lure. It uses the word
9 convince them to send the child to the U.S. And it doesn't use
10 Motley's name, but the problem is that every other statement
11 that the Does made in connection with the, quote unquote,
12 abduction involved Ms. Motley being an integral part of that
13 alleged scheme. And again, they knew that that was false. And
14 the falsity of it is actually apparent from their pleadings
15 themselves because they claimed that she made statements to
16 them before July 13th, 2019. And then they don't make any
17 statement or any allegation about statements she might have
18 made. All of the statements that they claim came from either
19 Joshua Mast or Osmani. And then after Baby Doe is taken from
20 them, the allegation is that she waited two -- I'm sorry, the
21 Does waited two months to reach out to Ms. Motley to say, The
22 person you introduced us to took Baby Doe.

23 Now, if Motley was so integral to this scheme that
24 she spent a year and-a-half befriending the Does, wouldn't she
25 be one of the first people that the Does reach out to when Baby

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1 Doe is taken from them? But no, they wait two months, and then
2 they say the person you introduced us to said X, Y and Z or did
3 X, Y and Z. And then they tell the AP and the *New York Times*
4 and others: Motley lured them to the United States. They knew
5 when they started making those statements that those statements
6 were false. They defamed Motley. And I understand we can't
7 point to the exact words that they said under cloak of
8 anonymity to the *New York Times* and the AP, but those articles
9 sure are very consistent with the pleadings. And this article
10 demonstrates that the Does talked to the reporters. And the
11 reporters are reporting on statements made to the reporters,
12 not just the pleadings.

13 Your Honor --

14 THE COURT: And I'm presuming that this article in
15 September of 2023 is referring back to the October 2022
16 article.

17 MR. HOERNLEIN: Well, it's not clear, Your Honor.
18 What is clear is that the Does told the AP reporters that they
19 were lured to -- or attempted to be lured to the United States.
20 That came from the Does. Whether it became before the October
21 article or whether it came after the article, whether it came
22 from the lawyers or by attribution, I mean, it's not really
23 clear. But at this pleading stage, we should not have to state
24 with that level of specificity. If the same Rule 8(a) applies
25 to our claims as to their claims, then we should be able to

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1 proceed to discovery on our claims as pled.

2 If Your Honor doesn't think that we've provided the
3 level of specificity required, we would like the opportunity to
4 replead. I don't know that we would do that, but depending on
5 how Your Honor's opinion comes out, it may or may not be
6 something we would want to do.

7 I also, Your Honor, would like -- unless there's
8 anything else about that?

9 THE COURT: No.

10 MR. HOERNLEIN: I would like to just address briefly
11 the intentional infliction point, because I'm not sure I agree
12 with Your Honor or Mr. Elliker about this, and perhaps
13 Mr. Moran.

14 So while the underlying conduct at issue in the
15 defamation claim -- which is making outrageously false
16 statements about Motley -- is the same conduct at issue in the
17 IIED claim, the IIED claim does not rise and fall with the
18 defamation claim because there are different elements and there
19 are different limitations periods. If Your Honor says, Well,
20 you know, this is time barred or these particular statements
21 are time barred, that might be true for defamation. I believe
22 IIED has a two-year limitation period.

23 THE COURT: It does. It's a personal injury claim.

24 MR. HOERNLEIN: Correct. So if Your Honor's decision
25 hinges on limitations, it doesn't foreclose the intentional

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1 infliction claim. And if Your Honor decides something about
2 republication, that would also not necessarily apply to IIED.
3 The point is, even if the conduct is the same, we submit that
4 the intentional infliction could stand on its own, depending on
5 how the Court comes out on the issues.

6 THE COURT: One of the questions that I had is
7 whether if I -- and I understand exactly how you -- it lets you
8 sweep back into -- even if I agree that defamation is time
9 barred -- some further statements, but I'll break it down this
10 way: I think you and Mr. Moran agree that the intentional
11 infliction claim arises out of the words spoken by the Does,
12 right?

13 MR. HOERNLEIN: Yes, Your Honor.

14 THE COURT: Spoken to the reporters and then
15 published. My question as I read it is: Do we run the risk,
16 if I agree with you that what's provided in the articles,
17 what's alleged is sufficiently to meet the first prong of an
18 IIED claim, and that is that it offends the generally accepted
19 standards of decency and morality of converting every
20 defamation claim into an intentional infliction claim? And
21 maybe there is a spot out there, maybe this passes that spot
22 out there, but I'm sensitive to that fact, that just because
23 you've alleged defamation per se doesn't get to an IIED claim.
24 That's the first thing.

25 And then the second is: Are there sufficient

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1 allegations of severe emotional distress as required? And I
2 think Judge Moon handed down a decision in June of this year --
3 not in your case, but in a different case -- that talks about
4 some of the pleadings required as to what the severity of the
5 emotional distress needs to be.

6 MR. HOERNLEIN: So Your Honor, I think as to the
7 first point, it's a good question. I'm not -- I think we do --
8 if there is a line, I think we clear it easily. I'm not
9 prepared today to say where that line is supposed to be drawn.
10 I don't think that you --

11 THE COURT: You're going to make me draw it, right?

12 MR. HOERNLEIN: Your Honor, you have the robe and I
13 don't, but I'm certainly happy to brief it and offer any
14 suggestions.

15 THE COURT: No, but I want to give you the benefit of
16 some of my thoughts. So if you had some response.

17 MR. HOERNLEIN: No, unfortunately, I don't know where
18 the line would be, but I think we -- as we have pled it, we
19 clear the line. If Your Honor doesn't think so, but thinks
20 that a second attempt might do it, then we'd be happy to take
21 that.

22 And Your Honor, as to your second question, which I
23 didn't write down --

24 THE COURT: It's whether -- and let me pull up Judge
25 Moon's --

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1 MR. HOERNLEIN: Oh, that's -- I'm sorry, Your Honor.

2 THE COURT: No, that's okay. It's a case called --

3 let me make sure I've got the right case. It's a case called

4 *Scheffer, S-C-H-E-F-F-E-R, versus Jamerson, J-A-M-E-R-S-O-N,*

5 handed down June 14th of this year, 2024, Westlaw 3013621. And

6 it looks like it's on a motion to dismiss. He writes -- it

7 looks like it's on page 3 of the Westlaw opinion -- with

8 respect to the severity element, liability arises only when the

9 emotional distress is extreme and only where the distress

10 inflicted is so severe that no reasonable person would be

11 expected to endure it. And he cites the *Russo* case. This is a

12 high standard. It requires a plaintiff to allege that their

13 emotional distress reached such a level of severity that every

14 aspect of their life was fundamentally and severely altered

15 such that they had trouble even walking out the door; and cites

16 the *Almy versus Grisham* and *Pennell versus Vacation Reservation*

17 *Center, LLC* case. I can give you those cites, if you want

18 those. If you pull the case up, you'll see them. Without such

19 severe -- without such serious life-altering symptoms, a

20 plaintiff cannot sustain an IIED claim in Virginia, and then it

21 goes on further.

22 Maybe he is applying a heightened pleading standard.

23 Maybe he is applying -- I don't think he cited *Iqbal Twombly* in

24 here, but he makes clear what I've always understood when I was

25 practicing and when I've been over here, is that an intentional

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1 infliction of emotional distress claim is separate and apart
2 from a run-of-the-mill tort claim. It's disfavored under the
3 law and it requires proof of severe emotional distress that
4 goes beyond the normal emotional distress that one might suffer
5 in these circumstances.

6 But whether there is those allegations there, I'll
7 have to go back and look at your counterclaim.

8 MR. HOERNLEIN: Understood.

9 THE COURT: Anything further?

10 I think you had a little bit of a different view on
11 the conspiracy issue, as well, than Mr. Elliker suggested.

12 MR. HOERNLEIN: Your Honor, just -- I'm going to just
13 rest on my brief.

14 THE COURT: Thank you very much.

15 MR. HOERNLEIN: If Your Honor has no other questions.

16 THE COURT: All right. Thank you very much.

17 Mr. Elliker?

18 MR. ELLIKER: Thank you, Your Honor. I will try to
19 be brief.

20 The question that I think Mr. Moran's argument about
21 republication raises is: What is the limiting principle? What
22 is the time period after which the October 2022 article can no
23 longer be the basis for a defamation claim? Is it the article
24 that was published last year? If the AP writes an article
25 about this hearing and they link back to the October '22

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1 article, I think under Mr. Moran's theory, he now has a new
2 claim. He can seek to amend his counterclaim and file a new
3 defamation claim. That is premised on statements that are
4 alleged to have been made more than two years ago and published
5 more than two years ago. And that is the reason why --

6 THE COURT: But he's right if they quote those
7 statements, right?

8 MR. ELLIKER: Well, Your Honor, I think there's
9 actually an important distinction between the liability of a
10 speaker when they give a statement the first time to the media
11 and the foreseeability of what that statement -- the time
12 that's published versus if that then gets republished over and
13 over again. And if I may, defendants that are noticeably
14 absent from the counterclaim defendants are the media entities
15 that wrote these words that actually are the ones who put the
16 ink to paper to craft -- I shouldn't say craft.

17 THE COURT: Well, let's not invite more parties.

18 MR. ELLIKER: Certainly I wouldn't. Look, I don't
19 think Mr. Moran wants to sue the AP and the *New York Times*. I
20 certainly don't think Mr. Hoernlein does either, and I don't
21 think that they should be. But a lot of what is being
22 discussed here in terms of the allegations that are alleged to
23 be defamatory, I heard a lot from the other side during the
24 argument that doesn't seem to be in the pleadings. And I think
25 that is a problem in Rule 8. But in terms of --

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1 THE COURT: That may be, and it kind of takes me
2 to -- I feel like I've jumped around and probably messed all of
3 you all's arguments up, and I apologize.

4 It takes me to what Mr. Moran -- where I think he is,
5 that if I disagree with him as to the pleading requirements
6 under Rule 8 and *Iqbal Twombly* and say you've got to give us
7 more, his argument with respect to republication is that there
8 is more to it than simply a statement shows up in an article
9 and maybe some folks have taken things out of the pleadings,
10 because if the pleadings are circulated by the Does or those on
11 behalf of the Does outside -- well, if they're circulated; in
12 other words, not just pulled from CM/ECF, that that is a
13 publication of all the statements that are then made within the
14 pleadings, which arguably become actionable, and he wants an
15 opportunity to try to find out how the press got this
16 information. What did the Does say to the press, if you will?
17 And I'm just going to have to figure that out, but I'd be
18 interested in your thoughts.

19 MR. ELLIKER: Well, Your Honor, that raises a good
20 point that I really want to emphasize. I know that you're new
21 to the case. Something that was new to me today was the
22 statement that we haven't produced documents from media
23 communications, which is not the case. And I know that
24 Mr. Francisco, who is co-counsel with Mr. Moran, has done a lot
25 of the discovery work, and so perhaps he's more versed with

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1 that. But the defendants have served RFPs for communications
2 with the media. Those have been produced. And so to the
3 extent we're talking about the ability to look and see what has
4 been communicated to the media, they have been.

5 And what doesn't appear in the pleadings here -- and
6 I can't say whether -- I'll put it this way: Whatever bar
7 Rule 8 poses to them now, presumably the opinion you write will
8 give them guidance on that. But then after that, for any
9 amended complaint, we're now going to be talking about whether
10 they actually have the facts to support that. And that then
11 becomes an issue of speculation or plausibility. And it cannot
12 just be the case that, well, they had to have gotten the
13 information from somewhere, and so therefore we presume that
14 because two years ago the Does spoke to the media, that now
15 everything that flows from that will continue to be a new cause
16 of action.

17 I put it this way, right, I mean, we talked a little
18 bit in the papers about the Johnny Depp case. And
19 unfortunately that had to do with tolling. That was a fun case
20 to talk about, and tolling did become an issue. But imagine
21 that -- and there was a statute of limitations issues there.
22 Ms. Heard was alleged to have made defamatory statements about
23 Mr. Depp, and that was published. Then time passed and claims
24 were barred after that. But I think under the theory here, if
25 Ms. Heard had given an interview to the media, said what she

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1 said, then they published it, and then years passed and the
2 same newspaper writes an update about the trial and says,
3 according to what Ms. Heard told us three or four years ago,
4 now they've got a new defamation claim against her.

5 And so what that puts in circumstances where you have
6 lots of media attention is just this snowball effect of every
7 single time that there is a new hyperlink put, as long as they
8 can say, well, the information we think is the private
9 publication -- which is a phrase that doesn't appear in the
10 complaint, the counterclaims -- but the private publication in
11 2022 gives rise -- every single time that is fuel for a new
12 article that that becomes another basis for defamation
13 liability. And I think that that raises the concern that Judge
14 Thacker talked about here in the *Lokhova* case was to say
15 that -- in quoting the Third Circuit -- if each link is an act
16 of republication, then the statute of limitations would be
17 re-triggered endlessly, and its effectiveness essentially
18 eliminated.

19 And the other thing that's in this complicated ball
20 of wax, Judge -- and the reason I started by talking about how
21 they haven't named any media defendants in here -- is that the
22 statements that surround hyperlinks are the statements of the
23 media. So now we're talking about third-party statements that
24 then are being used to republish what the Does are alleged to
25 have said years earlier. And again, that just brings me back

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1 to this idea of a limiting principle. And there is a portion
2 of Judge Thacker's opinion that talks about third-party tweets
3 too, and that third parties are not -- the original speaker is
4 not responsible for republications by other parties. So I
5 think --

6 THE COURT: But is responsible for republication by
7 the original recipient. In other words, I think Mr. Moran's
8 point is that these defamatory statements were made to the
9 reporter and then the reporter republishes. And to the extent
10 the reporter continues to republish, the speaker would continue
11 to be responsible for that, not if, then, another reporter
12 picks it up, and another reporter and another reporter and
13 another reporter. I think that's your point, right?

14 MR. ELLIKER: Well, Your Honor, I'm not sure I agree
15 with that. In the -- and that's because I think the identity
16 of the republisher is relevant. Again, all these republication
17 cases are usually where the defendant who is alleged to have
18 been the defamer is also the person who then did the
19 republication. That's the *Ryan Lizza* case. It's his own tweet
20 of his own article.

21 In *Lokhova*, it's a *New York Times* article that
22 creates a hyperlink to a previous *New York Times* article, and
23 the *New York Times* is the defendant in the case. And in
24 *Lokhova*, Judge Thacker wrote, The original *New York Times*
25 article that the appellant alleges was defamatory was

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1 hyperlinked in a later article. Thus, the hyperlink simply
2 served as a reference for the *New York Times'* existing
3 audience, and did not direct the old article to a new audience,
4 which is what is the focus of republication.

5 And the idea of directing to a new audience dates
6 back to the middle of the 20th century when you're talking
7 about how many copies of a single edition of the newspaper
8 versus the same statement appearing in multiple editions.

9 THE COURT: But certainly republication has to mean
10 more than the original speaker republishing because otherwise
11 there is no republication here. It's the statement to the
12 reporter is the defamatory statement. That's then republished
13 when it's put in the paper, correct? I mean, there is a
14 defamatory statement that's made to the reporter. And if it
15 dies on the floor, it never goes anywhere else, but there still
16 was a defamatory statement made. Nobody may know about it,
17 right, and then -- it's a little bit esoteric, but by
18 definition to Mr. Moran's point, there has been a republication
19 when it then resurfaces in the newspaper.

20 MR. ELLIKER: Yeah, Judge, I understand the logic. I
21 think in most defamation cases the moment of the newspaper
22 publishing is the first publication that's the basis for the
23 claim. And so it's usually not, you know, we go back and say,
24 well, technically when you gave the interview, that was a
25 publication and then when they published it, right?

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1 Now, there certainly can be cases where there is a
2 defamation claim that doesn't have to do with newspapers. If I
3 were to have a conversation with a group of people and just
4 said something to them --

5 THE COURT: So-and-so is a thief.

6 MR. ELLIKER: Right. Exactly. And so that could be
7 alleged to be defamatory. Of course, in that context I think
8 you'd be talking about that particular tort and the damages
9 that arose from that particular statement at that time.

10 And here the idea of fueling this broad narrative and
11 how the castigation in the media is not about the so-called
12 publication of the moment that the Does spoke to or gave an
13 interview. It's about the publication of these articles at
14 large.

15 And the last point I'll make, Judge, on the *Dominion*
16 case -- we did address the *Dominion* case in our reply brief --
17 I certainly don't disagree that there are statements that I
18 could make to you in this courtroom -- I won't, but there are
19 statements that I could theoretically make to you that if I
20 went on the courthouse steps and made, there's a difference in
21 my exposure if those statements are knowingly false. The
22 problem here is we don't know what the statements are.

23 THE COURT: But if you make statements in your
24 pleadings -- in other words, if you took your Supreme Court
25 pleading, which right now Mr. Moran agrees is protected, and

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1 you either make a press release and say, We have filed this
2 today -- this is Mr. Moran's point. And I don't know the
3 answer to the question. I've got to re-read the Dominion case
4 in this regard. You either -- and let's just say the harder
5 case for him would be if you simply send it out by way of email
6 as a press flash. Do you then lose the protection -- the
7 judicial immunity protection at that point?

8 MR. ELLIKER: Judge, I think so. I think you
9 probably do. And I don't dispute, right, there's a difference
10 between if Sydney Powell is going and giving an interview and
11 she's saying word for word what her complaint says, she can't
12 then come back in and say, No, no, no, I was just reciting
13 that. If you're out there doing a public reading of it, that's
14 a different type of --

15 THE COURT: Nor can she give it to a reporter and
16 say, Here you go.

17 MR. ELLIKER: I think that's probably a tougher case
18 and I'd want to research that whether -- if there were an
19 instance of someone just forwarding -- we know that reporters
20 can set up news alerts for Pacer and just get pleadings sent to
21 them. And if the only difference is it's an attorney just
22 forwarding it to them instead of -- and I'm not suggesting
23 that's what happened here. I think if Mr. Moran wants to
24 suggest that in an amended counterclaim, I really hope that he
25 has the factual support for it. I really do.

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1 THE COURT: Or does he need a chance to do a little
2 discovery?

3 MR. ELLIKER: Well, but the discovery comes after you
4 can make the claim that will pass Rule 11, Judge.

5 THE COURT: That's always the chicken and the egg
6 part of it. It's difficult.

7 MR. ELLIKER: I think that's right. I think we can
8 talk about the consequences of *Twombly* and *Iqbal* in that
9 respect, Judge. But I don't think that you can just come in
10 and put together a diffuse narrative that is identical to
11 statements that are privileged and just say, Well, we think
12 that they must have handed their pleadings to the *Associated*
13 *Press*, and based on that, the *Associated Press* thenceforth can
14 write whatever they want, and the Does will be liable for
15 defamation ad infinitum, right? I just don't think that's the
16 way that defamation law is put together. That's certainly -- I
17 mean, we have -- as you mentioned with Mr. Hoernlein, some
18 torts have a two-year statute of limitations. Some have five.
19 This has one. And I don't think that defamation is the kind of
20 claim that we want to have just lingering out there for ever
21 and ever, particularly you talk about the kind of evidence that
22 you have to put together.

23 And bear in mind, too, Judge, that if this were a
24 claim that were to go to trial, the proof of the defamation
25 claims is not the truth of what the Masts are alleged to have

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1 done to the Does. It's the truth of whether or not the Does
2 said what they're alleged to have said to the reporters. And
3 so what I think these allegations and the discussion today from
4 the other side has really pointed up is they really want to
5 dispute the underlying facts.

6 Mr. Hoernlein came here and he started by talking
7 about why he thinks that the plaintiffs' claims against his
8 client are insufficient and why they're disproven by what he's
9 brought forward in his counterclaims. But you disprove our
10 allegations in your answer and at trial, not by bringing
11 forward a claim for defamation.

12 THE COURT: Not to reopen another can of worms, but
13 that argues against the domestic relations exception because if
14 it goes to the truth of what was said, that's then going to go
15 to what were all of the facts and circumstances and the events
16 that occurred really back in Afghanistan, right?

17 MR. ELLIKER: I think that what it brings up is the
18 truth -- I mean, really the reason it's called a -- repeatedly
19 referred to it as a kidnapping narrative is because the lie
20 they say is the kidnapping, and their argument is we always
21 did -- we did this legally, right? We did this lawfully.

22 Now, Mr. Moran has made the point that maybe there's
23 a very narrow way that they could say in good faith we really
24 thought what we were doing here was the right thing to do, and
25 because of that, that's the truth. But I think our clients

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1 would be entitled to try to combat that and say, well, no, it's
2 not true. In fact, isn't it the case that you misled the
3 circuit court judge who signed the order?

4 THE COURT: That's always going to be the case,
5 right? I mean --

6 MR. ELLIKER: I certainly think it would always be
7 the case as to these claims in this court. And it's not a
8 question of whether or not those claims can be tried anywhere.
9 It's a question of whether those are claims that are proper for
10 this court to exercise diversity jurisdiction over. So that's
11 why we said, you know, I think there is a theoretical world if
12 these claims were not untimely that they could have been pled
13 in state court, right, the same way -- I mean, that's the idea
14 is we're not -- Judge Moon isn't saying these are claims that
15 can never be brought anywhere. He's just saying federal courts
16 don't touch domestic relations issues.

17 Judge, you've been very indulgent. I very much
18 appreciate it. I'm happy to answer any other questions.

19 THE COURT: I don't have any other questions. Thank
20 you very much.

21 While we're on the record, is there anything else we
22 need to address at this time? Mr. Moran?

23 MR. MORAN: Your Honor, the only thing I want to say
24 is if I did mischaracterize the state of discovery, I
25 apologize. I'll take a look at it. My understanding is that

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1 there were some things that were withheld that we had asked
2 for, but obviously we'll address that with opposing counsel.

3 THE COURT: Listen, I've got good lawyers involved
4 that know how to communicate with each other and know how to
5 share information. You have more than just a couple of
6 documents that you've exchanged back and forth. To have them
7 all at the forefront of your mind is a challenge at any time.
8 I'm not terribly worried about that. But thank you very much
9 for that, Mr. Moran.

10 Anything else to address on the record?

11 MS. ECKSTEIN: Not from plaintiffs, Your Honor.

12 MR. HOERNLEIN: No, Your Honor.

13 THE COURT: So we'll stand in recess.

14 (Proceedings adjourned, 2:43 p.m.)

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1 C E R T I F I C A T E

2 I, Lisa M. Blair, RMR/CRR, Official Court Reporter for
3 the United States District Court for the Western District of
4 Virginia, appointed pursuant to the provisions of Title 28,
5 United States Code, Section 753, do hereby certify that the
6 foregoing is a correct transcript of the proceedings reported
7 by me using the stenotype reporting method in conjunction
8 with computer-aided transcription, and that same is a
9 true and correct transcript to the best of my ability and
10 understanding.

11 I further certify that the transcript fees and format
12 comply with those prescribed by the Court and the Judicial
13 Conference of the United States.

14 /s/ Lisa M. Blair

Date: January 29, 2025

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